A

Nanda Kumar a/l Ranganathan v Lalita a/p Veeriah & Ors

B

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO 24NCVC–920–06 OF 2014
S M KOMATHY JC
28 OCTOBER 2014

C

Civil Procedure — Order for summary possession — Rules of Court 2012, O 89 — Plaintiff allowed defendants to occupy his condominium unit but they refused to heed demand to vacate property — Whether O 89 procedure could be used to obtain order for vacant possession — Whether O 89 only empowered court to grant order for possession and not to award damages — Whether plaintiff's claim for special damages for defendants' wrongful occupation could not be allowed

D

The instant application by the plaintiff was for an order for vacant possession of his condominium unit ('the unit') pursuant to O 89 of the Rules of Court 2012. The plaintiff had allowed the defendants to occupy the unit but when he subsequently demanded that they vacate the property, they refused to do so. In his letter of demand for vacant possession, the plaintiff notified the defendants that they would have to pay him damages in the sum of RM1,000 per day for each day they were in wrongful occupation of the unit from the date of his demand. Inter alia, the defendants contended that the damages sought was not claimable and that the O 89 procedure was wrongly used in this case as the defendants had occupied the unit with the plaintiff's permission.

E

F

Held:

G

(1) The claim for liquidated damages at RM1,000 per day was essentially a claim for special damages which had to be specifically pleaded and proven in order to be recoverable in an action. In O 89 proceedings, damages were not recoverable as the court was only empowered to grant an order for possession. The plaintiff was entitled to pursue his claim for damages in a separate action (see para 15).

H

(2) It was clear from O 89 that the procedure could be invoked either where the defendant's entry into the property was unlawful or where the initial entry was lawful but the defendant continued to remain in possession after his licence to remain on the property had been revoked (see para 10).

I

[Bahasa Malaysia summary

Permohonan ini oleh plaintif adalah untuk perintah bagi milikan kosong unit pangsapurinya ('unit tersebut') berikutan A 89 Kaedah-Kaedah Mahkamah 2012. Plaintif telah membenarkan defendan-defendan untuk menduduki unit

tersebut tetapi apabila dia kemudiannya meminta mereka untuk mengosongkan hartanah, mereka enggan berbuat sedemikian. Dalam surat tuntutannya untuk milikan kosong, plaintif memberitahu defendan-defendan bahawa mereka kena membayarnya ganti rugi sejumlah RM1,000 setiap hari untuk setiap hari mereka dalam penghunian salah unit tersebut dari tarikh tuntutannya. Antara lain, defendan-defendan berhujah bahawa ganti rugi yang dipohon bukan boleh dituntut dan bahawa prosedur A 89 digunakan dengan salah dalam kes ini memandangkan defendan-defendan menghuni unit tersebut dengan kebenaran plaintif.

Diputuskan:

(1) Tuntutan untuk ganti rugi jumlah tertentu sebanyak RM1,000 setiap hari adalah pada dasarnya tuntutan untuk ganti rugi khas yang mana perlu diplidkan secara khas dan dibuktikan untuk boleh didapatkan semula dalam tindakan. Dalam prosiding A 89, ganti rugi tidak dapat didapatkan semula memandangkan mahkamah hanya diberi kuasa untuk memberikan perintah untuk milikan. Plaintif berhak untuk meneruskan tuntutannya untuk ganti rugi dalam tindakan berasingan (lihat perenggan 15).

(2) Adalah jelas daripada A 89 bahawa prosedur boleh dibangkitkan sama ada di mana kemasukan defendan ke dalam hartanah adalah tak sah atau di mana kemasukan pada mulanya adalah sah tetapi defendan berterusan untuk kekal dalam milikan selepas lesen untuk tinggal di atas hartanah telah dibatalkan (lihat perenggan 10).]

Notes

For cases on order for summary possession, see 2(1) Mallal's Digest (4th Ed, 2014 Reissue) para 9622.

Legislation referred to

Rules of Court 2012 O 89, O 89 r 3

Jasbeer Singh Kaura (Nur Hakimah bt Mohamad with him) (Jasbeer, Nur & Lee) for the plaintiff.

Joseph Iruthayam (Joseph Iruthayam & Co) for the defendent.

S M Komathy JC:

[1] This is an application for an order for possession under O 89 of the Rules of Court 2012 ('the ROC'). It is supported by an affidavit affirmed by the plaintiff, Nanda Kumar a/l Ranganathan, on 23 June 2014.

[2] In response, the first defendant, Lalita a/p Veeriah, affirmed an affidavit on 24 October 2014 on her own behalf and the other defendants. Mr Jasbeer

Singh, counsel for the plaintiff objected to the use of the affidavit in these proceedings on the ground that it was filed out of time. Counsel for the defendants, Mr Joseph Iruthayam accepted that it was filed out of time. He therefore sought an adjournment to file the necessary application for abridgement of time. Mr Jasbeer strenuously objected to the adjournment on the basis that the application could have been made earlier and that this was simply a delaying tactic.

[3] The objection was sustained as sufficient time had been given to the defendants to file their affidavit in reply. I ruled the defendant's affidavit inadmissible .

BRIEF FACTS

[4] The plaintiff is an individual and the registered proprietor of a condominium unit in Villa Angsana Condominium located at Jalan Krian, off Jalan Ipoh, Kuala Lumpur. It was held under grant milik strata title No 4947/MI-A/2&22/151, No Petak 151, Mukim Batu, in the District of Wilayah Persekutuan, Malaysia ('the property').

[5] By several written notices dated 10 April 2014, 20 April 2014, 29 April 2014, 12 May 2014 and 15 May 2014, respectively, the plaintiff requested the defendants to vacate the property. The defendants, however, ignored the above notices. Whereupon on 11 June 2014, the plaintiff appointed the legal firm of Messrs Jasbeer, Nur & Lee to issue a formal notice of demand to the defendants to vacate the property within two days from the date of letter. The letter also stated if the defendants failed to vacate the premises within the time frame given, they will be liable to pay damages in the amount of RM1,000 per day every day calculated on a daily basis for the duration of their unlawful occupation, commencing from the plaintiff's first written notice to them.

[6] The defendants were adamant and refuse to deliver vacant possession despite the legal notice issued to them. On 8 July 2014, the plaintiff filed the present application for an order for summary possession under O 89.

THE DEFENDANTS OBJECTIONS TO APPLICATION

[7] The defendant resisted the application premised on the following grounds:

(a) Order 89 cannot be invoked where the initial entry into the property is lawful;

(b) the affidavit in support was defective; and

(c) the claim for RM1,000 a day for each day of occupation of the property was not claimable.

Issue a: Order 89 has been wrongfully invoked in these proceedings

[8] Mr Iruthayam contended that O 89 cannot be invoked where a defendant's initial entry onto the land was lawful. Order 89 procedure can only be resorted in cases where a defendant had entered the land without the owner's consent. In the present case, as the defendants had entered and occupied the property with the consent of the plaintiff, the reliance on O 89 was misconceived.

[9] In my judgment, this submission is clearly not supported by the language used in O 89. It provides:

> where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his license or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this order.

[10] It is clear from the provision that O 89 procedure can be invoked in two types of cases. The first, where the defendant's entry into the property is unlawful and the second, where the initial entry is lawful, but the defendant continues to remain in possession of the property after his licence to remain in the property has been revoked. I therefore find no merit in the first ground.

Issue b: The affidavit in support was defective

[11] Mr Iruthayam next contended that the affidavit in support was defective as the plaintiff had failed to explain the circumstances in which the property had been occupied without licence or consent and in which his claim to possession arises. He argued that this was an essential requirement of O 89 r 3. It requires a plaintiff to depose to the facts or circumstances in which the property came to be occupied by the defendant. A failure to comply with this requirement is fatal.

[12] In para 6 of the affidavit in support, the plaintiff has averred as follows:

> Saya dinasihati oleh peguamcara saya dan defendan-defendan adalah penghuni di hartanah tersebut di mana plaintif telah membenarkan defendan-defendan untuk menghuni unit kondominium tersebut dan pada masa material, plaintif sebagai pemilik yang sah mengkehendaki milikan kosong hartanah tersebut sebagai pemilik mutlak hartanah tersebut.

[13] It is plain from a perusal of para 6 that the plaintiff has in fact explained

that the circumstances in which the defendants had come to occupy the property. He has deposed that he had permitted the defendants to occupy the property, but that licence has been revoked. This averment shows that the plaintiff has explained the basis of his claim for an order for possession against the defendants.

Issue c: Damages of RM1000 a day

[14] The plaintiff also sought liquidated damages at RM1,000 a day with effect from 10 April 2014 until date of delivery of vacant possession. Mr Jasbeer accepted that this figure was unilaterally imposed on the defendants in the hope that it would deter them from remaining in the property.

[15] The claim for liquidated damages at RM1,000 a day is essentially a claim for special damages. It is trite that special damages must be specifically pleaded and proven in order to be recoverable in an action. In O 89 proceedings, damages are not recoverable as the court is only empowered to grant an order for possession. In my judgment, the plaintiff is not without remedy. He is entitled to pursue his claim for damages in a separate action.

CONCLUSION

[16] For the reasons given, I allow the plaintiff's application for an order of possession. The defendants to deliver vacant possession of the property within 21 days from the date hereof. The plaintiff's claim for damages at RM1,000 a day is therefore disallowed. The defendants to pay the plaintiff the RM6,000 as costs of these proceedings.

Order accordingly.

Reported by Ashok Kumar